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M.D. Miller Trucking & Topsoil, Inc. and General Teamsters Local Union No. 179, affiliated with International Brotherhood of Teamsters. Case 13–CA–104166

November 25, 2015

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND MCFERRAN

The General Counsel seeks summary judgment in this compliance proceeding on the basis that the Respondent's answers to the compliance specification attempted to raise matters that had been decided in the underlying unfair labor practice proceeding and are inadequate under the Board's Rules and Regulations. For the reasons that follow, we grant in part and deny in part the General Counsel's motion.

On December 16, 2014, the National Labor Relations Board issued a Decision and Order finding, in relevant part, that the Respondent, M.D. Miller Trucking and Topsoil, Inc., violated Section 8(a)(3) and (1) of the Act by refusing to accept Edward McCallum's current medical certification and requiring him to complete multiple medical certifications before he could return to work. *M.D. Miller Trucking & Topsoil, Inc.*, 361 NLRB No. 141 (2014). Among other things, the Board ordered the Respondent to offer McCallum full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, and to make McCallum whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. *Id.*, slip op. at 11.

On May 29, 2015,¹ based on noncompliance with the Board's Order, the Regional Director for Region 13 issued a compliance specification and notice of hearing, alleging the amounts due and notifying the Respondent of its obligation to file a timely answer complying with the Board's Rules and Regulations. On June 29, the Respondent filed an answer to the compliance specification, asserting that (a) McCallum could not be reinstated because he lacked the required medical certification to work; (b) McCallum lacked medical certification throughout the entire alleged backpay period; (c) the Regional Director's calculations conflicted with pay documents that the Respondent attached to its answer; and (d)

the Respondent lacked sufficient information to respond to most of the Regional Director's calculations.²

On August 3, the General Counsel moved for summary judgment on the compliance specification, contending that the Respondent's answers either attempted to raise matters that had been decided in the underlying unfair labor practice proceeding or failed to meet the specificity requirements of the Board's Rules and Regulations. On August 7, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted. The Respondent filed an Opposition brief to the General Counsel's Motion on August 19. The General Counsel filed a reply brief on September 2.

The Board has delegated its authority in this proceeding to a three-member panel.

On the entire record, the Board makes the following

Ruling on Motion for Summary Judgment

Section 102.56(b) and (c) of the Board's Rules and Regulations states, in relevant part:

(b) *Contents of answer to specification.* The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or to plead specifically and in detail to backpay allegations of specification* If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be found so by the Board without the taking of evidence supporting such allegation, and the respondent

¹ All dates are in 2015, unless otherwise noted.

² In its answer, the Respondent admitted paragraphs I(b), II, III(g), and IX(a) and (b), which set forth allegations unrelated to the specific amounts of backpay, reimbursements and fund contributions due.

shall be precluded from introducing any evidence controverting the allegation.

We examine whether the Respondent's answers, as supplemented by its opposition brief, satisfy the requirements of Section 102.56(b).

1. Backpay period

(Paragraphs I and XV of specification)

Paragraph I of the specification alleges that the backpay period begins on April 22, 2013, and ends when the Respondent extends McCallum an offer of reinstatement. Paragraph XV alleges that backpay and benefits continue to accrue as described in the specification until the Respondent makes McCallum a valid offer of reinstatement. The Respondent denies paragraphs I and XV, arguing that the backpay period should end on January 20, when it made McCallum an offer of reinstatement, which he did not and could not accept because he lacked the required medical certification. The Respondent also contends that, at all times during the backpay period, it is unknown whether McCallum possessed a valid medical certification.

In the underlying proceeding, the Board found that the Respondent violated the Act by refusing to accept McCallum's current medical certification and requiring him to complete multiple medical certifications before he could return to work because McCallum raised objections to benefit cuts during a meeting and filed grievances. 361 NLRB No. 141, slip op. at 1–2. Specifically, the Board found that, immediately following McCallum's successful grievance, the Respondent began to scrutinize McCallum's medical certifications more rigorously than in the past. *Id.* at 9–10. The Respondent required McCallum to submit a long form that had never been required previously, directed McCallum to get a second medical opinion from a doctor certified by the Federal Motor Carrier Safety Administration,³ and accused him of not being forthcoming by failing to check a box in the health history section of the form. *Id.* When McCallum notified the Respondent that he was successful in receiving a card and long form from another certified doctor, the Respondent failed to respond and did not permit McCallum to return to work. *Id.* The Board adopted the judge's conclusion that the Respondent used McCallum's medical issues as "an ideal subterfuge to avoid its obligation to reinstate him." *Id.* at 9.⁴

³ The Respondent chose this doctor and paid for the appointment.

⁴ In adopting the judge's decision, the Board stated that it "need not determine whether the judge erroneously refused to consider Federal Motor Carrier Safety Administration regulations. The issue here is the Respondent's motivation, not the substance of the regulations." *Id.*, slip op. at 1 fn. 5.

Following the Board's Order, by letter dated January 20, the Respondent offered McCallum reinstatement upon satisfaction of the medical certification qualification required to perform his job duties. The documents attached to the General Counsel's motion show that on January 29, McCallum provided the Respondent with a letter accepting reinstatement and a copy of his current medical certification documents. The Respondent once again rejected McCallum's medical certification and denied him reinstatement, asserting that the certification authorized McCallum for *intrastate* driving, rather than *interstate* driving as required. There appears to be no dispute that McCallum had inadvertently checked the wrong box on the form, and he immediately attempted to provide (via certified mail) a corrected certification to the Respondent.⁵ The Respondent, however, refused delivery of McCallum's certified letter. In its answer to the compliance specification, the Respondent also asserts that there were conflicting medical reports regarding McCallum's fitness to perform the job. But, as evidenced by its Opposition brief, the Respondent relies exclusively on arguments that it raised in the unfair labor practice hearing regarding McCallum's eligibility to work under Federal Motor Carrier Safety Administration regulations and his efforts to obtain a medical certification in 2012 and 2013.

It is well settled that a respondent may not relitigate matters in the compliance stage that were decided in an underlying unfair labor practice proceeding. *Convergence Communications, Inc.*, 342 NLRB 918, 919 (2004). Here, the Respondent's defense regarding McCallum's medical certification was raised in the underlying proceeding and expressly rejected by the Board in its decision as a pretext for unlawful activity. Likewise, we find no merit in the Respondent's argument that a genuine issue of fact exists as to whether McCallum possessed valid medical certification at all times during the backpay period. In support of this argument, the Respondent states that "as of the time of the hearing in this matter, McCallum did not have a valid medical certification." Again, this assertion rests on the same contentions that the Board has already rejected. Moreover, to the extent the Respondent challenges McCallum's medical certification because of his box-checking error following the Respondent's offer of reinstatement, we reject the Respondent's argument. McCallum quickly corrected

⁵ McCallum was familiar with the Respondent's requirement that drivers be certified for *interstate* driving, and he always had provided such certifications in the past, which the Respondent knew. As a result, the Respondent must have or should have recognized McCallum's inadvertent error, which we find does not create a genuine issue of material fact.

this mistake and attempted to provide a revised certification showing that he was cleared for *interstate* driving. The Respondent, having refused to recognize or even accept delivery of the most recent medical certification that McCallum submitted, is in no position to challenge the compliance specification on that basis. Accordingly, we agree with the General Counsel that summary judgment is warranted as to paragraphs I and XV.

2. Gross backpay, pension fund contributions,
and excess tax

(Paragraphs III and IX-XIII of specification)

Paragraph III of the specification addresses the method in which backpay was calculated. It sets forth the following formula: “An appropriate measure of the hours and earnings McCallum would have received during each calendar quarter of the backpay period is equal to his regular rate of pay multiplied by the average hours he had actually worked in each representative quarter from the two year period preceding his termination.”

Paragraphs IX-XI allege the appropriate measure of the amount owing to McCallum’s pension fund, including interim contributions and net back contributions, based on the collective-bargaining agreement between the Contractors Association of Will and Grundy Counties and General Teamsters Local #179. Paragraph XIII alleges the compensation McCallum should receive to offset the adverse tax consequences of receiving a lump-sum backpay award.

Apart from reiterating its arguments regarding McCallum’s medical certification, the Respondent offers only general denials to each of these paragraphs. Although the Respondent has appended worksheets to its specification, it does not provide a position as to the General Counsel’s premises or computations.⁶ For information within the Respondent’s knowledge, such as wages and pension fund contributions, the Respondent must specifically set forth the basis of its disagreement and provide support for its position. *United States Service Industries*, 325 NLRB 485, 486 (1998); *Carnival Carting, Inc.*, 345 NLRB 910, 911 (2005). The payroll records that the Respondent provided do not meet these specificity requirements because the Respondent did not provide any alternative formula or specific basis to dispute the allegations in the compliance specification. *Ace Unlimited*, 360 NLRB No. 32, slip op. at 3 (2014). Similarly, the Respondent must specifically rebut allegations regarding adverse income tax consequences. *Don*

⁶ Notably, the Respondent previously failed to comply with the General Counsel’s investigative subpoenas to provide payroll and other documentation in order to determine McCallum’s backpay.

Chavas, LLC d/b/a Tortillas Don Chavas, 361 NLRB No. 10, slip op. at 5 (2014).⁷

In sum, the Respondent has failed to specifically deny or set forth the basis of its disagreement with the amounts of gross backpay, pension fund contributions, and excess tax assessment included in the compliance specification, and has failed to offer any alternative formula or figures for computing these amounts. Accordingly, we agree with the General Counsel that, pursuant to Section 102.56(b) and (c), summary judgment is warranted as to paragraphs III and IX-XIII.

3. Interim earnings and expenses

(Paragraphs IV-VII of specification)

Paragraph IV alleges the amount of McCallum’s interim earnings per calendar quarter (zero dollars). Paragraph V states that net backpay is the difference between McCallum’s gross backpay and interim earnings. Paragraph VI alleges that McCallum engaged in a work search and describes the expenses he incurred. Paragraph VII addresses McCallum’s loss of medical insurance benefits and other medical expenses incurred because he lost the benefits that would have otherwise been available to him through the Respondent. The Respondent offered a general denial to paragraphs IV-VII.

Where information is not within the respondent’s knowledge, such as a discriminatee’s interim earnings and expenses, a general denial is sufficient to warrant a hearing on those issues. *Douglas Electrical Contracting*, 337 NLRB No. 47, slip op. at 2 (2001); *Dews Construction Corp.*, 246 NLRB 945, 947 (1979). The Board has applied the same principle to medical expenses. *Kolin Plumbing Corp.*, 337 NLRB 234, 236 (2001). Accordingly, we shall deny the Motion for Summary Judgment on paragraphs IV-VII and order a hearing limited to the issues of McCallum’s interim earnings and expenses.⁸

ORDER

IT IS ORDERED that the General Counsel’s Motion for Summary Judgment is granted except with regard to allegations concerning the discriminatee’s interim earnings and expenses.

⁷ The Respondent also generally denies paragraph XII, in which the Regional Director reserves the right to amend any or all provisions of the specification to include information now not known to the Regional Director. We reject this argument, as Sec. 102.55(c) expressly gives the Regional Director this authority.

⁸ Paragraphs VIII and XIV both incorporate charts that summarize the Respondent’s total backpay obligations to McCallum. We grant summary judgment on these paragraphs, except as detailed above. Thus, we find that the gross backpay amounts are as alleged in the compliance specification, but that the net backpay calculations are subject to the hearing that we shall order regarding the discriminatee’s interim earnings and expenses.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 13 for the purpose of arranging a hearing before an administrative law judge on the issues of interim earnings and expenses.

Dated, Washington, D.C. November 25, 2015

Philip A. Miscimarra, Member

Lauren McFerran, Member

Mark Gaston Pearce, Chairman

(SEAL)

NATIONAL LABOR RELATIONS BOARD